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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 642.

JOSEPH DOTO, also known as JOE ADONIS,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

REPLY BRIEF FOR PETITIONER.

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Reply to Respondent's Point I.

Respondent (page 6) dealing with the admissibility of the ships' manifests, cites a mass of cases which it contends is in harmony with the ruling by the court below. None of the cases cited, except the last one (*Harrison* case), dealt with multiple hearsay but instead involved situations where either the persons making the record had first hand knowledge of its contents or the record constituted an admission against interest. The *Harrison* case was decided by an intermediate appellate court of the State of Pennsylvania which sustained the admission of a ship's manifest for purpose of proving the age of decedent. Whether the information in the manifest as to the decedent's age was furnished

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by him does not appear. This case points up the need for clarification of these statutes by this Court.

The statement in the last paragraph on page 14 of the petition, that Title 28, U. S. Code §§1732 and 1733 have never been considered or construed by this Court, we have discovered to be incorrect. The scope of §1732 was fully considered in *Palmer* v. *Hoffman,* 318 U. S. 109 (1943). The decision of the Supreme Court of New Jersey is in conflict with the *Palmer* case. In addition to the cases cited in the third paragraph at page 16 of the petition, see also *Matthews* v. *United States,* 217 F. 2d 409 (5 Cir. 1954).

Respondent's argument (page 7) and the cases cited therein are in no way applicable to the instant case. The admissibility of the ships' manifests hinged upon whether they were admissible "by virtue of any federal statute to prove the facts therein contained" (Appendix F, p. 52, N. J. S. 2A :82-16). Likewise, under this statute the admissibility of the Italian birth certificates hinged upon whether "the same shall have been first exemplified according to acts of Congress of the United States". The very foundation for the admissibility of these documents depended upon the construction and interpretation of the federal statutes quoted in Appendix E, pp. 50, 51. The determination of such federal law in the application of state law gives rise to a federal question for review by this Court. *Smith* v. *Kansas City Title Co.,* 255 U. S. 180 (1921); *Standard Oil Co.* v. *Johnson,* 316 U. S. 481 (1942). Cf. *Hall* v. *Jordan,* 15 Wallace 393 (U. S. 1872).

Respondent's statement (p. 8) that the New York Census records were admitted into evidence at the trial after proof that they were admissible "in Courts of records of the State of New York as evidence of the contents thereof" is unsupported by the record (N. J. Appendix, p. 243a-38).

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Reply to Respondent's Point III.

Respondent (p. 14) refers to pages 23 to 25 of the petition, and states that the proof there referred to (the fingerprint records and the arrest books) was offered as "admissions of the defendant in contradiction of his expressed belief that he was born in Passaic". The record does not indicate such a statement by the prosecutor. The State offered the fingerprints to establish identity (N. J. Appendix, p. 239a-25), and one arrest book was offered to corroborate the witness Conley's testimony (N. J. Appendix, p. 268a-33). The trial court dealing with the other arrest books indicated that it allowed this proof "for the purpose of identifying the defendant" (N. J. Appendix p. 218a-25, 38).

Respondent (pp. 16 to 19) sets forth a synopsis of the testimony of certain state witnesses as "direct evidence" and draws the conclusion that this proof supports the finding of the court below. There could be no direct evidence of petitioner's state of mind on February 10, 1953 at the time he uttered the statement that he was born in Passaic, New Jersey. Such a statement at best is one of belief.

In this review respondent fails to advert to the reason and purpose for the testimony furnished by the five relatives of the petitioner. Not one of them gave direct testimony as to where petitioner believed he had been born and the sole effect of their combined testimony was to lay the foundation for receiving the exhibits in evidence (New Jersey Appendix, pp. 112a-13; 136a-28; 139a-4, 12 and 22). It was the exhibits (Italian birth records, manifests and census records) and not the testimony of petitioner's relatives, upon which the State relied to prove its case (New Jersey Appendix, p. 261a-25).

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Witnesses Laciskey and Tams (p. 16), employees of the New Jersey State Prison (N. J. Appendix, pp. 80a-20; 82a-25) interrogated petitioner in the course of their duties. The trial court concluded that their testimony was inconsequential (N. J. Appendix, p. 279a-26).

Respecting the testimony of witness Katz (p. 18) respondent failed to disclose that on cross-examination it was developed that petitioner had testified that he believed he had been born in New Jersey (N. J. Appendix, p. 162a-12).

The State in setting forth this proof overlooks the basic principle expressed by this Court in *Kotteakos* v. *United States,* 328 U. S. 750, 765 (1946), where it was held:

> "• • • The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Respectfully submitted,

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